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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 17

INTERSTATE COMMERCE COMMISSION
Appellant,

vs.

J-T TRANSPORT COMPANY, INC., ET AL.
Appellees.

On Appeal From The United States District Court
For The Western District of Missouri

BRIEF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE AS AN AMICUS CURIAE

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THE INTEREST OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

The League is a nationwide organization of shippers using all forms of transportation, including railroads, motor carriers (both common and contract) water carriers and air carriers. The organization is constitutionally dedicated to the promotion of sound conditions in transportation, and to that end it takes part in many proceedings before the Interstate Commerce Commission and in the courts where issues of national transportation importance are involved.

Broadly speaking, the League has an interest on behalf of its membership, as representative of the general shipping

public, in the principles and policies governing the right of entry into the transportation field; it is concerned that the public need for adequate and competitive service by all modes of transportation shall be given due consideration in the determination of applications for motor carrier licenses.

In particular, the League is concerned that the availability of contract carrier service (as an essential substitute for exempt private carrier operation) shall not be denied simply for the protection of existing common carriers from competition.

This is the first case to present for judicial review the criteria that are being followed by the Commission in contract carrier applications since the statutory standards were changed by amendment in 1957 to the Interstate Commerce Act. In this case the Commission denied an application for contract carrier authority on the ground that "we cannot find that existing service has been shown to be inadequate." (R. 47)

It is the position of the League that contract carrier service cannot lawfully be denied on the ground that there is a common carrier willing and able to perform the transportation.

We point out that the League has no interest in the operating rights of any particular carrier and takes no position in any case with respect to whether the requisite finding of consistency with the public interest is supported by the evidence. The sole concern of the League is that the determination of that issue shall not be made to depend upon the existence of common carrier service.

ARGUMENT

I.

THE 1957 AMENDMENTS CHANGED THE STANDARDS GOVERNING CONTRACT CARRIER APPLICATIONS

The essence of the Commission's view of the case is reflected in the brief for appellant (pages 21, 28) where it is developed that the Commission has long treated the availability of common carrier service as a crucial factor in passing upon contract carrier applications; it is urged that the 1957 amendments did not change the statutory standard so as to impair the validity of that commission policy. In all of this, the Commission stands upon the proposition that the underlying purpose of regulating contract carriers was to promote and protect common carrier service.

We submit that the 1957 amendments clearly express a congressional intention to relax the requirements for entry into the contract carrier field, and this intention was expressed in two ways: First, by imposing a more strict definition upon contract carriers and thus limiting the field for contract carrier operation, Congress reduced the need on the part of true common carriers for protection from contract carrier competition. Second, the Congress in 1957 for the first time specified the criteria for determining contract carrier applications for the future and in so doing it rejected and omitted the very test which the Commission applied in the case at bar.

The future field of contract carriage was narrowed by adding to the definition of contract carrier in section 203(a)(15) the requirement that a contract carrier operate under continuing contract with one person or a limited

number of persons either (a) for the assignment of vehicles to the shipper's exclusive use for a continuing period of time or (b) for the furnishing of services designed to meet a distinct need of each individual customer. Coupled therewith, the Commission was for the first time given authority under section 209(b) to prescribe in a contract carrier permit the number or class of persons for whom the carrier could perform service. Finally, and at the same time, the Congress provided in section 212(c) for conversion to common carrier status of any existing contract carrier whose operations were found not to conform to the new definition.

The total effect of these changes was clearly to decrease the size of the contract carrier field, indeed it permitted restriction of new carriers to service for particular shippers. As a result, the number of contract carriers has been greatly reduced by conversions and the field of operations of newly licensed contract carriers is much restricted as compared with the rights of the former contract carrier, who could aggressively seek new business with an unlimited number of shippers. *United States* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). These changes appeared to warrant some relaxation of the requirements for entry into the field.

The Congress did relax the requirements for entry into the field of contract carriage by specifying in section 209(b) the limited tests for determining whether issuance of a permit would be "consistent with the public interest and the national transportation policy". In so doing, Congress omitted any reference to the adequacy of existing service or to the willingness and ability of common carriers to perform the transportation service. The omission was particularly significant in the light of the legislative history, as pointed out in the opinion of the learned District Court (R. 166-7). As introduced, the original bills

provided that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." This provision was deleted by Congress after sharp controversy and with the approval of the Commission itself. As finally enacted, the new standards of Section 209(b) were that the applicant be "fit, willing and able properly to perform the service" and that the operation be "consistent with the public interest and the National Transportation policy." In determining the latter, Congress provided explicitly that the Commission should consider:

> "the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

Notwithstanding the congressional enumeration of the above considerations for determining consistency *both* with the public interest and with the national transportation policy, the Commission takes the position that the criteria do not "preclude our consideration of other factors" (R. 43) and "are not the only ones which should or can be considered in the determination of a contract carrier application." (R. 48) They then turned to the national transportation policy itself as warranting an additional test: the willingness and ability of existing common carriers.

In so doing, we submit that the Commission simply nullified the 1957 amendments and that the District Court correctly concluded that the effect of the Commission's decision is to apply the very standard first proposed in the amendment then subsequently withdrawn. (R. 169)

II.

THE COMMISSION'S ORDER WOULD NULLIFY THE DIFFERENCES IN THE STATUTORY STANDARDS FOR COMMON AND CONTRACT CARRIER LICENSING

The definition of a contract carrier in section 203(a)(15) has at all times, both before and after the 1957 amendments, included a parenthetical clause grammatically designed to make common and contract carriage mutually exclusive: contract carriage is "(other than transportation referred to in paragraph (14) and the exception therein)"; paragraph (14) of course defines a common carrier. The plain intention of Congress was to distinguish the two types of carrier. Its intention in this respect is reaffirmed in the 1957 amendments by the provisions of section 212(c) permitting conversion of any contract carrier who was licensed under the old definition but finds himself outside the new definition.

There was sound foundation for the action of Congress in differentiating between the two types of carrier. The foundation consisted of the essential difference in the nature of contract carriage, which is a substitute for private carriage. Commissioner Eastman, who was Federal Coordinator at the time of the enactment of the Motor Carrier Act, 1935, in a concurring opinion in *Keystone Transp. Co., Contract Carrier Application* 19 M.C.C. 475, 498 (1939) explained that the "legitimate purpose" of a contract carrier is to furnish a specialized and individual service "which a common carrier, because of the character of his obligations to the general public, could not well undertake to supply."

If the Commission had preserved the purity of the statutory categories, all might have been well. However, it did not do so. As the court below wisely observed upon a review of past Commission decisions (R. 165) "any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable."

The present case sharply forcuses the practically identical outlines of the common and contract carrier categories as they have been revamped by the Commission. For in one breath the Commission has here held (R. 45) "that the operation proposed [by applicant] comes within the new definition of contract carriage" and (R. 49) "that the character of shippers transportation requirements is not such as to preclude performance by a common carrier." *This is to say, contrary to law, that a contract carrier service is proposed but a common carrier can perform it.* It appears that U.S.A.C. may have been misclassified as a common carrier and that it should have been issued a permit as a contract carrier, in which event the questions presented in this case might not have arisen.

CONCLUSION

The League hopes that this Court will here render an opinion which will require preservation of the separate statutory categories. Under section 204 of the Interstate Commerce Act private carriage does not require any licensing; as a proper substitute therefor, contract carrier licensing should be governed by the special standards provided in section 209(b), which are different from and less than the standards for issuing common carrier certificates under section 206. The League submits that the decision of the District Court should be affirmed.

Respectfully submitted,

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